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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 NATIONAL JEWISH DEMOCRATIC
4 COUNCIL, et al.,

5 Plaintiffs,

6 v.

18 CV 8787 (JPO)

7 SHELDON D. ADELSON,

8 Defendant.

9 New York, N.Y.
10 December 12, 2019
11 11:10 a.m.

12 Before:

13 HON. J. PAUL OETKEN,

14 District Judge

15 APPEARANCES

16 EMERY CELLI BRINKERHOFF & ABADY
17 Attorneys for Plaintiffs

18 BY: RICHARD EMERY
19 ANDREW WILSON
20 ANDREW JONDAHL

21 JONES DAY
22 Attorneys for Defendant

23 BY: LEE ARMSTRONG
24 JAMES GROSS
25

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(Case called)

THE COURT: Good morning. Welcome everyone. Sorry for the delay. More than half of the elevators in this building currently don't work because the renovation, apparently seven years closing the building wasn't enough to fix the elevators. So everyone is running a little late, but they will be fixed sometime in 2020.

I brought the parties in. I know there's a couple of other things pending, including a motion for reconsideration, and there's an interlocutory appeal that Mr. Adelson is pursuing in the Second Circuit, but in the interim I received the parties' letters at Docket Numbers 57, 58 and 59 regarding a few other issues, so I wanted to bring you in to talk about those.

Before we get into that, could I just get an update on the status of discovery, where things stand at this point? I understand there's been a deposition of Mr. Adelson, right, and no either other depositions?

MR. ARMSTRONG: Your Honor, there has been only one deposition, and the only deposition that the plaintiffs have asked for so far, that's Mr. Adelson. We have noticed, I believe it's six people. We haven't taken any depositions because that relates to the one of the issues that we raised before your Honor. We are awaiting their review of various documents that they say they will not review unless we pay for

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1 them.

2 I don't know if you want me to go further with the
3 discussion, but that's -- I will tell you that it has, at least
4 from our side, been sort of a one-way street. We negotiated
5 search terms back in the summer, and we went back and forth, we
6 had several meet and confers, we tweaked the terms, pretty
7 elaborate terms and conjunctions and additives, and we ended up
8 with a universe of documents that we agreed in the stipulation
9 we would review. We went ahead and did that. We then produced
10 responsive documents, we provided a privilege log and provided
11 Mr. Adelson for his deposition.

12 We were waiting for them to do their part, and then
13 three weeks ago we hear for the first time that they are not
14 going to produce -- they're not going to review any of these
15 documents because they believe we should pay for their review,
16 and then they he added on the other issues that are before you:
17 We should pay for their attorneys' fees, we should pay on an
18 interim basis and accept service on Mrs. Adelson of the
19 subpoena that they have served. And they want to add --

20 THE COURT: Dr. Adelson.

21 MR. ARMSTRONG: -- Dr. Adelson, that's correct.

22 THE COURT: I gathered all that from the letters.

23 First of all, let me say an as overview I'm quite
24 disappointed in all of you, because the last time I saw you
25 there was talk of once these very interesting legal issues got

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1 resolved that you would work out the amount of compensatory
2 damages and this would be resolved, and you obviously have
3 completely different ideas about what is lawsuit is about. I
4 have decided the interesting legal issues, at least some of
5 them, and it seems like you're nowhere near a resolution. I
6 don't know whose head is in the clouds, but I was hopeful that
7 this would be something that's resolved.

8 Let me give you all a chance to respond.

9 MR. WILSON: Good morning your Honor, Andrew Wilson
10 for the plaintiffs.

11 The case has been progressing in some ways the way in
12 which my colleague has summarized it, but we are continuing --
13 the major issue in discovery happened in around September of
14 this year when we got an additional series of custodians from
15 an entity that's called Blue Light. This is a political
16 consulting group that basically took on the role of keeping
17 NJDC on life support and sort of a hibernation mode after the
18 Adelson lawsuit and its repercussions. And the document trove
19 that we got from Blue Light was so substantial that we came
20 back to the defendants and wanted to renegotiate some of the
21 terms because we had tripled the number of documents we were
22 going to have to look at. And that was actually a productive
23 exchange. We ended up coming to an agreement with the
24 defendants about narrowing some of the surplusage in the terms
25 in around the middle of November.

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1 Then notwithstanding the narrowing of the terms, we
2 still have around 55,000 documents to review, and that required
3 us, in order to meet the timeframe that we wanted to, to retain
4 an outside vendor to do a threshold relevance review. And
5 that's when we began the meet and confer process with
6 Mr. Adelson's attorneys to see if we could agree on some form
7 of cost shifting, because it's substantial out-of-pocket cost
8 for us.

9 Those are issues on -- the merits we can talk about
10 later on, but to give your Honor the update, we have gone
11 forward. We have retained that vendor. We have already begun
12 the review. We have gone out of pocket to enter into that
13 contract. The review is underway. We received this week the
14 first four batches of documents. Those are under review by our
15 firm. We expect to make the next rolling production within the
16 next week.

17 It's also not fair to say that discovery has been a
18 one-way street. We produced more documents so far than
19 Mr. Adelson has. I think we have about 4,000 pages --

20 THE COURT: Sorry to interrupt. So you're saying it's
21 not the case that you are holding up on the condition that I
22 grant the fee shift.

23 MR. WILSON: That's correct, your Honor. We recognize
24 that these documents need to be reviewed one way or the other,
25 so we moved forward to commence that production. And

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1 notwithstanding -- without prejudice, of course, we are asking
2 that the Court rule on our request to shift of the costs, but
3 we recognize that we need to move forward with discovery, and
4 so we have done that. And we're actively reviewing those
5 documents, and as I said before, we have already in this case
6 produced more documents than Mr. Adelson has.

7 MR. EMERY: Can I add one quick thing to that?

8 THE COURT: Yes.

9 MR. EMERY: I think there are -- first of all, to
10 answer your question, we did have a failed mediation which
11 everybody attended and I think in good faith tried, just so
12 you're aware of that. That was a couple -- two and a half
13 months ago, I think, approximately.

14 The second thing relating to your questions about
15 discovery, one of the issues before you relates to the
16 discovery, obviously the addition of David Harris, either he
17 files his own case or is added here, and that is going to
18 affect discovery as well. So there's been a little uncertainty
19 about the scope of discovery because of the Harris issue, which
20 remains up in the air.

21 THE COURT: Okay.

22 MR. WILSON: And the last thing, just for
23 completeness, we have worked with Mr. Adelson's attorneys. We
24 have earmarked two weeks in January for the six depositions
25 that have been noticed, with the expectation that they could be

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1 concluded at that time. The additional document review that
2 we're undertaking right now and the potential to add Mr. Harris
3 may affect those dates, but we certainly have held those dates
4 with the intention of going through with them if we're able to
5 do so.

6 THE COURT: So you think you're on schedule to produce
7 all the documents -- putting aside the Mr. Harris issue, you
8 think you're in a position to produce all the documents before
9 the depositions are scheduled?

10 MR. WILSON: We're moving as fast as we can. The
11 current number -- the short answer is I hope so. But to be
12 more specific, we have given the vendor until December 20 to
13 conclude the threshold relevance review, but then it shifts to
14 our firm to review 50,000 documents. It's a rolling basis, but
15 it's still a massive undertaking for our firm, so it's pushing
16 us into trying to review the documents over the holiday period
17 when staffing is more of an issue, and then we lined up the
18 deposition dates in early January.

19 So we're mindful that we have a deadline and are
20 working towards it, but depending on how things work out today,
21 it would certainly be a more humane schedule for the attorneys
22 on the team if we could have a little more room than January 31
23 to adjust these depositions, but we're taking the deadline
24 seriously and that's why we moved forward with retaining the
25 vendor and doing the review.

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1 THE COURT: Okay. So it's not a condition on
2 production, as you suggest.

3 MR. ARMSTRONG: That's news to me, your Honor. And
4 also encouraging to hear that they continue to review. That's
5 news to us as well.

6 THE COURT: So let's go to the first issue, which is
7 the request for leave to amend to add Mr. Harris.
8 Mr. Armstrong, do you agree that you could file a separate
9 lawsuit in any event?

10 MR. ARMSTRONG: I do, your Honor.

11 THE COURT: There's not a statute limitations issue?

12 MR. ARMSTRONG: I don't believe so, your Honor.

13 THE COURT: So given that, if I granted an extension
14 of discovery by a couple of months, would you oppose the
15 addition of Mr. Harris?

16 MR. ARMSTRONG: We would not, your Honor.

17 THE COURT: Okay.

18 MR. ARMSTRONG: It's simply that concern.

19 THE COURT: Okay. So given that, I don't have a
20 problem with the request to add Mr. Harris, coupled with an
21 extension of say two months for fact discovery.

22 Does that make sense to everybody?

23 MR. EMERY: It does to me.

24 MR. ARMSTRONG: Only because we don't have a good
25 sense as to with we would get the documents, it sounds fine

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1 now, and if we get them in early January, that should be fine.
2 But if it slips, then we may need to revisit the issue.

3 THE COURT: Okay. And it may be that you put you off
4 the depositions to February or whatever.

5 MR. WILSON: Yes, your Honor. We're in agreement.
6 We're going to be making a rolling production. We would not
7 oppose some extension, reasonable extension if we're unable to
8 meet the deadlines that we're setting for ourselves internally
9 with Mr. Adelson's counsel. We have already gathered together
10 the electronic discovery from Mr. Harris in anticipation of
11 adding him to the case, so we will be ready to apply search
12 terms, but we do need to meet and confer with Mr. Adelson
13 because I imagine there will be some additional search terms
14 that specifically relate to Mr. Harris. So in the event that
15 that process takes us to a point where we need a little more
16 time, then I'm sure we could work something out and submit a
17 joint letter on that subject.

18 MR. ARMSTRONG: That's fine, Judge.

19 THE COURT: Good enough. So the request to add
20 Mr. Harris as a plaintiff is granted. Fact discovery is
21 extended from the end of January to the end of March for now.
22 That will be reflected in a minute entry or an order. So you
23 will be able to file an amended complaint that adds him, I
24 assume.

25 MR. WILSON: Yes, your Honor.

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1 THE COURT: In the next what, week or two?

2 MR. WILSON: Yes, your Honor, two weeks certainly,
3 before December 20.

4 THE COURT: Okay, amended complaint will be filed
5 within two weeks of today. Actually between now and the 27th.
6 By the 27th there will be an amended complaint adding
7 Mr. Harris.

8 So let's go to the other issues. The next issue, I
9 think, is the request for an award of interim costs and fees.
10 Plaintiffs request an award at this point of \$429,000 in costs
11 in fees, and then periodic, I guess, awards thereafter.

12 And I guess here's my question: In my opinion
13 granting partial summary judgment, of course I concluded that
14 the preconditions under the Nevada statute for compensatory
15 damages and attorney's fees and costs were met. Of course, I
16 didn't determine that there were compensatory damages. There's
17 an additional requirement that plaintiff prove injury before
18 there's any compensatory damages. I don't know if there's any
19 case law on attorney's fees under the Nevada statute, I assume
20 it's like Section 1983 or many other attorney fee-shifting
21 statutes which require a bunch of factors to be considered,
22 including degree of success. So my main question about the
23 request is putting aside what I think is fairly unusual,
24 awarding interim fees -- you cite cases, but I don't think it
25 happens much -- why would I do it when I don't know that

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1 there's any compensatory damages?

2 MR. EMERY: If I may, your Honor, you have been very
3 experienced in this statute already. You actually wrote an
4 attorney's fees decision in this case about a year and a half
5 ago that looks at the Nevada law on fees. But more
6 importantly, this statute itself doesn't seem to make
7 contingent fees on compensatory damages.

8 Now I don't think there's much dispute here, there
9 can't be any dispute that we would -- although Jones Day is
10 disputing it -- that we're going to obtain some amount of
11 compensatory damages which weren't attorney's fees. There's a
12 great deal of evidence. You will see the complaint in Harris,
13 in Harris' case, this is also true to some degree of Mark
14 Stanley, the organization lost contributions substantially.

15 THE COURT: They'll argue causation.

16 MR. EMERY: I understand they will argue causation,
17 but there's a whole series of various categories, silos of
18 damages here which are attributable to these events. Timing is
19 very strong to indicate it, as well as a lot of direct
20 testimony as to the consequences. In Harris' case, he
21 literally, because of this lawsuit -- and he will testify to
22 this effect -- quit the organization, had to go into therapy,
23 and changed his entire life, literally. And you will hear all
24 of that.

25 THE COURT: You said Stanley or Harris?

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1 MR. EMERY: Harris.

2 Now I do think as a first blush matter, the way you
3 ruled, and the way -- and I haven't seen any contrary authority
4 to the way you ruled, the compensatory damages is not a
5 prerequisite to attorney's fees. The prerequisite to
6 attorney's fees is the dismissal of the original SLAPP suit.
7 The anti-SLAPP policy is very clear.

8 THE COURT: But there's two buckets of fees. There's
9 the first fees from the first case --

10 MR. EMERY: I understand that.

11 THE COURT: -- where I think it's basically automatic
12 from what I found were reasonable fees; happened to be for the
13 defendant in the defamation case.

14 Now we're looking at a separate case as to which the
15 Nevada statute says the person against whom the action is
16 brought may bring a second action to recover compensatory and
17 punitive damages and attorney's fees and costs of bringing the
18 separate action.

19 MR. EMERY: That's right. And it does not say, as I
20 understand it, that compensatory damages have to be awarded.
21 Now I agree with you that that is unlike any other attorney's
22 fees provision that I'm aware of, but that's what it says.

23 THE COURT: Fair enough. But I do think that it's
24 probably reasonable to read implicit in the statute a good
25 faith basis for thinking there are compensatory damages, if

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1 nothing else.

2 MR. EMERY: I think that's true, and I think your
3 opinion in September and your grant of summary judgment on
4 liability of compensatory damages is enough to satisfy that
5 aspect and that policy under the statute. The concept that
6 we're not going to prove a thousand dollars, \$10,000, \$20,000
7 in compensatory damages in this case is -- I mean I think there
8 will be many millions that a jury would award here. But the
9 fact that you found liability I think satisfies the statute.
10 That's the argument we're making, that it satisfies the
11 statute. And the notion is completely counterintuitive that we
12 will not prove any compensatory damages.

13 Let me say one more thing, and that is this case is
14 unlike any other and stronger than any of those that we have
15 cited because of the summary judgment grant under the statute
16 for compensatory fees and damages.

17 Maybe you feel in retrospect that you went too far,
18 but I don't think you did, and I think that it's now the law of
19 the case when these expenses started piling up and four
20 lawyers, sometimes five lawyers in our firm are working very
21 hard on this case, as well as a lot of staff, and we are at
22 \$581,000 at this point right now, as compared to when we wrote
23 the letter, and it's an enormous burden. And we are
24 financing -- the clients and we are financing --

25 THE COURT: I assume this is on a contingency.

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1 MR. EMERY: Yes, I'm not going to deny that, of course
2 it's on a contingency. We're a 25-lawyer firm, we take
3 contingency cases. We did this one with good reason. And we
4 assume we're not going to get any bonuses here, we're going to
5 get our fees, ultimately. Perhaps maybe we'll have a bonus, we
6 might have a bonus, it's not clear. But the fact is that we're
7 financing Jones Day's unlimited resources to do interlocutory
8 appeals, reconsideration motions, to push hard on discovery, to
9 do a lot in this case that over the last year and a half has
10 been, to say the least, innovative.

11 THE COURT: Well, you choose to take the case though.

12 MR. EMERY: Absolutely. We're not going to do
13 anything other than pursue this case vigorously and represent
14 our clients no matter what your ruling is.

15 THE COURT: Let me ask under the Nevada statute let's
16 say someone brings a separate action for compensatory and
17 punitive damages in a situation where there was literally no
18 compensatory damages, I probably still would have granted
19 partial summary judgment on liability for compensatory damages
20 even though no injury had been shown because the precondition
21 under the statute has been met. But then they incur \$5 million
22 in attorney's fees, would that be reasonable to award that if
23 the lawyer knew there's actually no compensatory damages?

24 MR. EMERY: Your Honor, there's no question that this
25 matter, this issue of interim fees in Nevada and everywhere is

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1 within your discretion. It's something that you can make the
2 reasonable judgment about. Obviously, if a case had no
3 compensatory damages and it was perfectly obvious and somebody
4 was milking that because they had gotten a ruling on attorney's
5 fees like the one you gave us, that would be within your
6 discretion to deny fees in the end, probably, and as an interim
7 matter.

8 Here it's also within your discretion, I believe, and
9 there's no question in my mind that this is something that
10 nobody can second guess. He won, as a practical matter, that
11 in this case you know the history of this case, you know how
12 it's being litigated, you know that we are spending money on it
13 that is interest -- that is essentially interest-free
14 investment in the case, which is certainly something that we
15 took on, and I'm not suggesting it's not something we're taking
16 responsibility for, but at the same time, as a matter of
17 equity, when you have someone who has unlimited resources on
18 the other side and is using them extensively in the manner in
19 which he is litigating this case, as a matter of discretion, I
20 believe you can exercise that discretion to equalize the
21 situation between the parties.

22 THE COURT: Well, Mr. Armstrong, I will give you a
23 chance to respond, but I want to continue on this for a minute,
24 because the cases under Section 1983 and the fee shifting under
25 1988 are based on the statutory language of prevailing party,

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1 and not judgment like the case that defendants cite under the
2 FLSA. Now the case law -- first of all, I have actually never
3 had a request for interim fee shifting. It's not common.

4 MR. EMERY: I agree. I don't think it is that common.
5 It happens.

6 THE COURT: It happens. I don't know that you have
7 given any particular reason for it other than the sort of
8 disparity in the kind of wealth of the parties.

9 MR. EMERY: The financing of the litigation that they
10 are expending in a scorched earth manner, in my opinion.

11 THE COURT: Okay.

12 MR. EMERY: The interlocutory appeal is, in my view,
13 completely frivolous. *Ernst*, in the Second Circuit, absolutely
14 makes it clear in a SLAPP suit, the same situation in Vermont,
15 there is no interlocutory appeal. Whenever you reach the
16 merits of the underlying case, there can never be an
17 interlocutory appeal, and they can't escape that, no matter how
18 hard they try. We obviously spent a lot of time opposing the
19 interlocutory appeal and making our motion to dismiss in the
20 circuit. It's a perfect example of the manner in which this
21 case is being litigated.

22 THE COURT: This is a contingency fee case. You took
23 that risk.

24 MR. EMERY: With someone who has unlimited resources
25 on the other side.

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1 THE COURT: But Section 1988, Judge Caproni points
2 out: As to Section 1988, the Supreme Court has held Congress
3 clearly contemplated that interim fee awards would be available
4 where a party has prevailed on an important matter in the
5 course of the litigation. Under the Nevada law there's nothing
6 like that. In fact, the Nevada law arguably textually suggests
7 that it should be the end of the case, because it says: may
8 bring a separate action to recover attorney's fees and costs of
9 bringing the separate action. If anything, that seems to
10 suggest something other than the interim prevailing party
11 situation. And in any event, you haven't prevailed on
12 anything. There's not going to be an injunction here.

13 MR. EMERY: Your Honor, I suggest the summary judgment
14 grant is prevailing. It certainly creates a very substantial
15 change in the position between the parties. And that's the
16 standard that I understand is a basis for a discretionary
17 interim fee award.

18 Now obviously it's most likely the case that in most
19 cases fees aren't awarded until after all appeals are
20 exhausted. But this case seems to me to cry out for a
21 different treatment as a matter of discretion, and I don't
22 think there's anything about the Nevada statute which in any
23 way precludes you from exercising your discretion in this
24 regard.

25 In the 1988 cases there no cases where an entitlement

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1 to fees has been ruled on already, as there is here, and it
2 seems to me that this case is stronger than any of the 1988
3 cases that are cited.

4 THE COURT: Mr. Armstrong, you have been patiently
5 waiting.

6 MR. ARMSTRONG: Thank you, your Honor. I think your
7 Honor put the finger on the real Achilles heel here. The
8 question you initially asked was on the basis of interim fees
9 and what the statute says about that, and we have had a
10 discussion about overall damages. But the question that we're
11 here today on that is tee'd up before you is: What is the
12 authority that you might have to award such interim fees, and I
13 suggest there is nothing. The statute is silent on it. You
14 already said that.

15 As you recognized in Adelson I, under Nevada law
16 what's important in figuring out the quantum of attorney's fees
17 is the result. As you put it, "the result, whether the
18 attorney was successful, and what benefits were derived." And
19 of course in that case you waited until the appeals were
20 exhausted before awarding the fees.

21 Here there is no prevailing party. The Nevada case
22 says in circumstance like this the plaintiff here can be
23 considered a prevailing party, which is a term of art. It's in
24 the civil rights arena. And the case that they rely on, one of
25 their two 1988 cases, provides as follows, and I will provide

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1 the cite for you later if that's okay, your Honor. "Because
2 the statute was enacted to 'ensure effective access to a
3 judicial process to persons with civil rights grievances,' a
4 prevailing plaintiff 'should ordinarily recover attorney's fees
5 unless special circumstances would render such an award
6 unjust.'"

7 In those civil rights cases, in both cases, judgment
8 was granted either, and/or, finding the statutes or the
9 practice unconstitutional and issuing an injunction.

10 THE COURT: Isn't that essentially what I have done,
11 though, by ruling in the underlying, in Adelson I, that the
12 anti-SLAPP statute applies, which is essentially a civil rights
13 statute, it's a First Amendment civil rights statute, isn't it?

14 MR. ARMSTRONG: But it's not an action under this
15 specific statutory scheme, and there is no support for that
16 notion. And it shouldn't be. I mean these are not
17 similarly-situated plaintiffs, it's civil rights plaintiffs.

18 Mr. Emery's firm, as stretched as it may be, according
19 to him, he took on this case. The NJDC was awarded \$2 million,
20 about, by your Honor, and then decided to go forward and see
21 what they could get. They understood who they were litigating
22 against. And what they describe as predatory and scorched
23 earth is just Mr. Adelson doing what we can do as a defendant
24 under due process.

25 So this whole notion that we're pushing up the costs,

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1 that we're extending this litigation, is not true. But
2 remember the result here, there really is no result, your
3 Honor, because as you pointed out, we don't know what the
4 compensatory amount of damages are going to be. Mr. Emery says
5 it's a very strong case, they will be able to show it. I'm not
6 going to prejudge, but I will say this: In the documents that
7 they have produced thus far, there is no documentary support in
8 contemporaneous records that indicates that any damage was
9 caused by Mr. Adelson; indeed, it tells a totally different
10 story, which makes it a little irritating.

11 THE COURT: What about the emotional distress and the
12 time of having to deal with it and having to find a lawyer,
13 that's some compensatory damage.

14 MR. ARMSTRONG: That's a moving target, too.
15 Mr. Stanley started with a very broad-based emotional distress
16 claim, and now he's pulled that back to garden variety
17 emotional distress with basically no discovery. So this has
18 been a moving target from the beginning. And the story that
19 the documents tell is one of a completely inept organization
20 that can't fund raise, infights, lawsuits against each other.
21 The only mention of Mr. Adelson is in the context of being sort
22 of gleeful that they're fighting with their arch nemesis.
23 That's what the documents thus far show.

24 In addition, we may obviously ultimately prevail on
25 appeal. And if so, that would render all of this moot, and

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1 then there would have to be an undoing and unraveling. What's
2 more, in cases such as this interim fee applications, it's not
3 simply we really don't want to spend more money, could you give
4 us 500,000, there's a process by which I assume, if you were
5 inclined to do any of this, you would have a magistrate judge,
6 you would have plaintiffs submit bills, we get the right to see
7 if the fees are reasonable, and this would go -- then there
8 would be a report and recommendation to your Honor. This would
9 go and on and on, all of which may be rendered moot, and the
10 ultimate result of the case could be zero, as unlikely as
11 Mr. Emery thinks, or there is a reversal on appeal and an
12 ultimately victory of Mr. Adelson. This unprecedented, your
13 Honor, there is absolutely no basis for interim attorney's fees
14 here.

15 THE COURT: Okay. Anything you guys want to add?

16 MR. EMERY: One quick point. I think our contention
17 is the statutory scheme here you ruled on is much more
18 solicitous of granting fees in the general sense than 1988.
19 And that that's why a ruling base on compensatory damages
20 triggers that.

21 More pointedly, the precondition, that is, dismissal
22 of the original SLAPP suit, is the only issue here. There's no
23 prevailing party language; not that we wouldn't have to be
24 prevailing parties, but we are prevailing parties already, in
25 my view, with respect to the liability issue and the attorney's

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1 fees issue, which you ruled on. And that's really the basis on
2 which we're asking you to exercise your discretion.

3 THE COURT: You're basically asking for me to shift
4 all the fees you have you incurred so far. At least I would
5 have to go through some reasonable fee analysis and give them a
6 chance to object.

7 MR. EMERY: Right. We could submit you the bills
8 tomorrow. They're very detailed. They're very carefully put
9 together. It's not like your first case where you had simply
10 affidavits of work. There are contemporaneous bills that are
11 by every lawyer that's worked on this case, every paralegal
12 that worked on this case, and it would be a pure lodestar
13 analysis at this point.

14 THE COURT: Did you want to add something?

15 MR. WILSON: Your Honor, there is one other discrete
16 issue which related, and that is costs, which I think could be
17 analyzed under a slightly different framework in that there
18 are -- there is precedent with electronic discovery to shift
19 burden in circumstances where the party who is seeking it is
20 seeking a substantial -- well, their requests require the other
21 party to incur substantial burden. So I think as your Honor is
22 considering whether to shift fees, there should also be
23 consideration whether to shift costs.

24 In this case we have been working well with
25 Mr. Adelson's counsel in trying to narrow the scope of these

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1 requests, and I think that's a process which worked well, but
2 it still has resulted in quite a massive document review which
3 has concrete out-of-pocket costs associated with it. And right
4 now the run rate of the search terms we have agreed upon is
5 around 12 percent to be responsive. So we have contracted to
6 be able to undertake this with a vendor to do it quickly, but
7 that is a substantial cost which is the result of Mr. Adelson's
8 requests that he sought. So that was part of the request is to
9 shift that burden to the party who is seeking that.

10 THE COURT: Understood. And there may be discrete
11 issues that I will let you respond to that on that, but what is
12 the amount, 50,000 or something?

13 MR. WILSON: The vendor costs specifically is
14 approximately \$55,000, and that will change depending on --
15 obviously Mr. Harris' data set would affect that.

16 THE COURT: Did you want to say anything about that,
17 Mr. Armstrong?

18 MR. ARMSTRONG: I did, your Honor. The presumption
19 here -- and the plaintiffs allow for this -- is each responding
20 party pays its own share. Our costs for the same first level
21 review of the documents that were netted by their search terms
22 was essentially the same, and we obviously didn't go to them.

23 At bottom, with all of this request for fee shifting
24 and cost shifting, what I'm hearing is it's a firm who took on
25 a contingent lawsuit and now wants the defendant, who has a lot

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1 of money, to finance that lawsuit. I've never heard anything
2 like this. There's no support in any case I have ever heard of
3 that would support something like this. They have to convince
4 you, Judge, on costs, now that we're talking about costs, to
5 not follow the presumption. They have given you no legal basis
6 to do that other than, quote: Help me out, your Honor.

7 THE COURT: I understand all those points. The one
8 tweak to how you describe it that I would add is they have won
9 partial summary judgment on entitlement to compensatory damages
10 and attorney's fees for this separate action. And I spun out
11 the scenario where there's no injury to plaintiffs, and in that
12 scenario there's an argument they should actually get nothing,
13 not even the costs. But as long as the plaintiff's lawyers had
14 a reasonable basis for thinking there was some compensatory
15 damages, it's surely reasonable for them -- and we know now
16 they're going to recover the costs of vendors in searching
17 through emails, right?

18 MR. ARMSTRONG: If I may, let me push back on that,
19 Judge. We don't know what the record ultimately is going to
20 show. I have to make that explicit. But if they reviewed the
21 documents that they produced to me, it would be unreasonable to
22 think that they will get compensatory damages here. Because
23 other than the self-serving testimony of Mr. Stanley and now
24 Mr. Harris, the documents do not support that narrative.

25 Mr. Adelson's lawsuit did not cause the demise of this

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1 institution. Just didn't happen. Now that may change, but if
2 all they saw was the universe that I saw, it would be
3 completely unreasonable. If I went back to my partners and
4 said I have this contingency fee case but here are the relevant
5 documents, I would be laughed out of the room. I don't think
6 that's reasonable.

7 THE COURT: Okay. I'm going to reserve on this now
8 because it's an interesting issue.

9 The only other question I was ask, I was going to
10 spend time looking at Nevada law specific to this statute on
11 this particular fee shifting issue. I assume you all have
12 looked at that and there's nothing particularly helpful along
13 the lines of interim fees under this law.

14 MR. WILSON: We have looked at it and we would have
15 given you those cases if we found them, but we have not.

16 MR. EMERY: Either way.

17 THE COURT: And do you agree with me?

18 MR. ARMSTRONG: I do agree, but it does come back to
19 case that you cited in Adelson I, which is the result. I don't
20 know how a judge would be able to in any way value the level of
21 the win that they have already achieved without seeing the end
22 result. So even if there were compensatory damages, what if
23 they wound up being 500,000 and they spend 7 million together,
24 that is in hindsight. You need to wait to the end to provide
25 anything to stay in compliance with Nevada law.

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1 THE COURT: I take the point, although I think even
2 you acknowledge that the individual plaintiff here is seeking
3 garden variety emotional distress, and surely there's a good
4 faith basis for the plaintiff to think is some compensatory
5 damages, and there's kind of a threshold amount of fees
6 generated, maybe a couple of hundred thousand dollars or a
7 hundred thousand dollars or something, that I would think goes
8 with any reasonable undertaking of the case in that situation,
9 even if it's more than the compensatory damages that a jury
10 will ultimately find.

11 MR. ARMSTRONG: Even if that's so, remember, we agreed
12 on the legal standard, which the presumption is otherwise. And
13 so I'm still at a loss to understand what the basis is to
14 reverse that presumption.

15 THE COURT: You don't think that I have discretion.

16 MR. ARMSTRONG: I don't know. If you don't mind, I
17 would like to think about that a bit more. I don't know the
18 answer to that question.

19 THE COURT: I'm going to reserve on that. It's an
20 interesting question and this case is full of them. I'm going
21 to think about that a little more. If there's any more case
22 law that you find, obviously you should let me know.

23 By the way, before we get to the issue of Miriam
24 Adelson, I wanted to ask what you all have in mind in terms of
25 where this case goes under Nevada law at the end of the day.

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1 Is it a jury trial or is it bench trial, or is there a law on
2 that, do you know?

3 MR. WILSON: Your Honor, I don't think there is law on
4 it, but I think the presumption is that it would be a jury
5 trial, but that's something that we haven't discussed with
6 Mr. Adelson's attorneys yet.

7 THE COURT: Do you guys have views on that yet?

8 MR. ARMSTRONG: We don't, your Honor. We haven't
9 thought about it.

10 THE COURT: Okay.

11 MR. ARMSTRONG: But we'll confer in good faith, and if
12 the law is clear, then we certainly won't dispute it; and if
13 it's not, it will be another interesting question for your
14 Honor.

15 THE COURT: Okay. And then I think the last issue,
16 unless there are others that you want to raise, is the question
17 of service of a deposition notice and subpoena on Miriam
18 Adelson. And I read your letters on this.

19 Frankly, I don't know that I have enough before me to
20 decide it, and it makes me somewhat tempted to direct defense
21 counsel to accept service on her behalf, given the
22 representation in the documents about her having an
23 attorney-client relationship with defense counsel, and then
24 maybe filing a motion to quash the subpoena or whatever you
25 would file if it were served.

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1 And the reason for that is I just don't know, there's
2 one email that plaintiffs cite, I don't know that that moves
3 the ball very much. There's the issue of spousal privilege
4 that would limit what she could talk about, perhaps
5 attorney-client privilege will limit what she could talk about.
6 I'm not sure what need there is for it. Is it proportionate to
7 the needs of the case, is kind of the question that I have. I
8 will hear from both you; otherwise, I might need more briefing
9 on this.

10 MR. ARMSTRONG: So we have two issues. The one that
11 is tee'd up before you today by the letter is simply service.
12 And if they obtain that from you, then the next fight will be
13 over the actual deposition.

14 On the service, again, no authority to support the
15 proposition that Mr. Adelson is to be deemed the agent for his
16 wife to accept service. True there was an affidavit submitted
17 with respect to Adelson I and Dr. Adelson's dealings with
18 Mr. Adelson's counsel to explain why we believe those
19 communications are privileged and why we put them in our
20 privilege log. That's a very specific agency, and it's an
21 agency of Dr. Adelson. There is no evidence in the record that
22 Dr. Adelson ever gave Mrs. Adelson the right to accept service
23 of process. But they are married and stood at the alter and
24 said "I do," but that doesn't mean, "I do accept service for
25 you." I don't think it means that in Nevada.

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1 THE COURT: I hope not.

2 MR. ARMSTRONG: I hope not, too. Doesn't mean it
3 here. There's no law to support that, your Honor.

4 THE COURT: But didn't it follow from that
5 representation that your firm represents her, or not?

6 MR. ARMSTRONG: I don't believe so. I want to check
7 that. I don't want to misrepresent anything to the Court, but
8 I don't -- I think it was only the attorneys from Adelson I,
9 but if you guys know differently, please --

10 THE COURT: I guess you guys weren't in Adelson I.

11 MR. EMERY: We were not.

12 THE COURT: Do you want to address that issue?

13 MR. EMERY: Let me just say that we believe she has
14 extraordinarily probative information about the events that
15 occurred between late July when the reports of the Macau
16 activities were first reported by all the big press services,
17 and then on August 5th the NJDC put up its petition referring
18 to those under the fair report privilege, which we all learned
19 about here, and then after it was taken down on July 11 --
20 sorry, late June, starting in late June when the first reports
21 came out, early July is when the petition went up and then came
22 down, and then there were demands for an apology, which is
23 reflected to some degree in that email that we cited to you,
24 and then in early August when the demands for an apology and
25 Mr. Adelson said in his deposition is he didn't care about the

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1 money, he sued them for \$60 million, but he just wanted his
2 pound of flesh and an apology and the like, and he sued them
3 then in early August.

4 She was a part of this whole decision-making process
5 all through that time. She clearly has a lot to say about
6 punitive damages, in our view. Mr. Adelson does not use email,
7 she does. I think her emails will be very important in this
8 case beyond the one that we have. We may have others that I
9 haven't reviewed yet but that are going to be produced, but the
10 fact is we do have this one. And her role in Mr. Adelson's
11 life in making decisions about protecting their businesses, as
12 they see it, and protecting his reputation, as she sees it, is
13 very, very prominent.

14 Then we have, an addition, their statement that she
15 was acting as his agent and that therefore she should not be
16 viewed in the normal sense. The context of that was the
17 affidavit that was filed by Mr. Adelson in saying that she was
18 his agent in this matter.

19 And so I just think that she's a central witness. I
20 don't think there's any way around it. She's central to the
21 facts of what occurred in the summer of 2012.

22 THE COURT: But what about the legal question about "I
23 do" doesn't mean "I do consent to a subpoena."

24 MR. WILSON: Your Honor, we have a 15-page privilege
25 log which is populated largely by communications between

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1 Dr. Adelson and various attorneys, and with that privilege log
2 is the declaration that she acted as the agent of him.

3 So our argument is basically we have a witness in the
4 case who is at the center of communications relevant to the
5 case, we think that there are a number of communications with
6 people outside of the privilege. We have about two dozen
7 emails that talk about the repercussions of the case, people
8 like Alan Dershowitz and Rabbi Shalomi, other sort of prominent
9 figures in the community that write emails of support to
10 Dr. Adelson, and through her, Mr. Adelson. And the premise is
11 very straightforward. This is someone who is right at the
12 center of decision making who may have had communications with
13 others about the decision to bring the case or not bring the
14 case.

15 We have been very judicious in our discovery in the
16 case. The deposition of Mr. Adelson, perhaps one of the most
17 important people, did not run the full seven hours. We noticed
18 the deposition for Dr. Adelson in Las Vegas with the intent of
19 going out. I don't think this is more than a half day
20 deposition focused on the documents, we already have been
21 produced about 24 emails, and any other oral communications.

22 The legal issue that begins all of this is agency. It
23 just struck us that having served her already in Nevada and
24 having not received any response from her back in the summer,
25 that now that we have a new declaration saying that we can't

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1 get any communications from her with lawyers because she's
2 Mr. Adelson's agent, it struck us there seemed to be a
3 disconnect between her asserting she is an agent of
4 Mr. Adelson, yet at the same time Mr. Adelson's attorneys can't
5 accept service on her behalf. So we thought those two things
6 were related.

7 I suppose the alternative is we go to Nevada and we
8 move to compel based on service from May, and it's further
9 expense in the case, which we certainly can.

10 THE COURT: So the declaration she was an agent of
11 Mr. Adelson was admitted.

12 MR. WILSON: In this case to support a privilege,
13 assertion of privilege. The declaration was provided here to
14 support the privilege log, and the underlying communications
15 for which she was an agent are on Adelson I.

16 THE COURT: So she has not produced documents in this
17 case.

18 MR. WILSON: Well, we have received documents in this
19 case, but they were produced by counsel for Mr. Adelson. So
20 how is it Mr. Adelson has possession of her emails is a
21 question for Mr. Adelson's attorneys, but I think it is because
22 Mr. Adelson communications to others through her and her email
23 account.

24 THE COURT: So are there emails that are responsive to
25 the requests that are to and from Dr. Miriam Adelson that have

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1 not been produced?

2 MR. ARMSTRONG: One second, Judge.

3 (Pause)

4 MR. ARMSTRONG: Your Honor, as we sit here now, we
5 don't know if there's any emails between Dr. Adelson and
6 Mr. Adelson that have been produced. We know that we checked
7 with servers of the SAN's and Mr. Adelson, and to the extent
8 there were any responsive documents that were not privileged,
9 we produced them, and we know we did produce such documents.

10 THE COURT: But did you search emails to and from
11 Miriam Adelson?

12 MR. ARMSTRONG: Yes, your Honor, on their SAN's
13 account.

14 THE COURT: So you already have the documents.

15 MR. WILSON: That's right, your Honor, we have
16 non-privileged documents from her. We want to depose her on
17 those documents and other oral communications that relate to
18 the subject matter of those documents, and we need to serve
19 her. We served her in Nevada but she didn't respond. She is
20 the wife of the defendant in this case. Mr. Adelson has, since
21 our service, supplied us with a declaration saying that he will
22 not produce additional documents from her email account on the
23 grounds she was acting as an agent for him.

24 THE COURT: Why would that be a basis to not produce
25 documents?

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1 MR. WILSON: Because the argument is that she is a
2 conduit for the privilege, that if she speaks to a lawyer,
3 she's speaking on behalf of Mr. Adelson.

4 THE COURT: Communications to and from lawyers.

5 MR. WILSON: Correct.

6 THE COURT: But her communications to and from other
7 people, like Mr. Dershowitz, they have to.

8 MR. WILSON: Those documents have been reviewed and
9 produced to us. And so what we have is a witness for whom
10 Mr. Adelson seems to have the custody and control of some of
11 her documents, and for which Mr. Adelson is arguing that there
12 is an attorney-client privilege that flows through her because
13 she is an agent, and so he is benefiting from that agency
14 insofar as he is asserting privilege, but then he is trying to
15 also use it in some sense as a shield from receiving process of
16 the deposition subpoena.

17 MR. ARMSTRONG: To go back to beginning; sort of
18 muddled, but talk about the merits of the deposition. The
19 reason that they want to depose Dr. Adelson is to try to prove
20 punitive damages. That requires not what is in Dr. Adelson's
21 head but what's in Mr. Adelson's head, his mens rea, his
22 impression or thought to bring the demise of the NJDC.

23 They have given you nothing, your Honor, other than
24 the affidavit we have been talking about, the agency affidavit
25 for purposes of attorney-client privilege, and an email that

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1 they grossly mischaracterize as Dr. Adelson saying we are going
2 to bully the NJDC now. I respectfully ask you to take a look
3 at that email.

4 THE COURT: I did.

5 MR. ARMSTRONG: It's not what it says, and I'm
6 surprised such good lawyers would do that. But they have given
7 you nothing else. The fact that they're married, courts in the
8 circuit have said to watch carefully, because the polite word
9 for what they're doing is seeking a fishing expedition, and
10 impolite word is let's get her to the deposition chair and then
11 maybe Mr. Adelson will finally write us a bit check. That's
12 what is going on here. There is no basis given to you for what
13 she might know that wouldn't be privilege because her husband
14 said it to her at night before going to bed or she was talking
15 to the attorneys in Adelson I. If they want to attack the
16 privilege, that's one thing, but in terms of whether is this is
17 proportionate under these circumstances, I have heard nothing
18 relevant other than repetition that she's his wife.

19 THE COURT: Do you want to respond?

20 MR. WILSON: Your Honor, the email itself speaks for
21 itself. What it is, and your Honor has read it, is it's a
22 discussion about the bullying dynamic going on with this
23 litigation. They were alleged by -- NJDC was complaining that
24 they were being bullied by Mr. Adelson. Dr. Adelson responded.
25 Whether her response is with a sense of irony or frustration or

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1 whether she's delivering it straight is a question for her to
2 answer. I think it could be subject to multiple
3 interpretations.

4 The reasons that we submitted it, your Honor, is just
5 to show that she's talking about these things in a
6 non-privileged way with other parties, and that's a reasonable
7 area for inquiry. And this is not a fishing expedition. She
8 is someone who was fielding conversations. And we have another
9 dozen emails of this ilk where she's communicating with people
10 about the decision and repercussions of the lawsuit, which is
11 not going to be -- like I said before, I don't perceive this to
12 be a very long deposition, but it would narrowly tailored,
13 focused on the communications that she had concerning the
14 decision to bring and the repercussions from the lawsuit.

15 THE COURT: I would probably be inclined to direct
16 service of the notice of deposition, given the agency
17 admission, for lack of a better word, but I am really not
18 persuaded that it's proportionate. I don't think the
19 deposition of Mrs. Adelson, given the most probative material
20 would be either attorney-client or more likely spousal
21 privilege, it doesn't seem to move the needle. I want to
22 confirm that you have the emails. I was going to grant the
23 relief of ensuring that any emails that are not protected from
24 or to her are produced, and I want you to confirm that you have
25 done that, but other than that, I'm not going to order her

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1 deposition. I don't think it's proportionate.

2 MR. WILSON: Your Honor, we are limited to emails, and
3 we would request that the email search would not be limited to
4 the SAN server but also any other email accounts that
5 Dr. Adelson used as agents for Mr. Adelson.

6 THE COURT: I think that's fair.

7 MR. ARMSTRONG: Okay, Judge.

8 THE COURT: Anything else for now?

9 MR. ARMSTRONG: I think that's it.

10 THE COURT: Thanks everybody.

11 MR. ARMSTRONG: Thank you.

12 THE COURT: Have a good holiday.

13 (Adjourned)